## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 7:21cv378
	)	
VIRGINIA POLYTECHNIC INSTITUTE	)	
AND STATE UNIVERSITY, et al.,	)	
	)	
Defendants.	)	

## <u>AMENDED REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT</u> <u>TO RULE 12(b)(1)</u>

Defendants Virginia Polytechnic Institute and State University, Timothy Sands, Alexey Onufriev, and Tamara Cherry-Clarke, by counsel, submit this reply brief in response to plaintiff John Doe's ("Doe") opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

For his opposition, Doe incorporates by reference his previously filed opposition, ECF No. 14, and offers no further argument. Thus, Doe concedes that he may only seek equitable relief from Virginia Tech and the individual defendants in their official capacities for purposes of his due process claim under 42 U.S.C. § 1983 because Virginia Tech is entitled to Eleventh Amendment immunity. Doe also concedes that Onufriev is not a proper party to the Title IX claim.<sup>1</sup>

Bizarrely, the rest of Doe's opposition focuses on why he believes he has "stated a claim for violations of due process." ECF No. 14, \*6. That argument has no relevance and is



<sup>&</sup>lt;sup>1</sup> Yet, Doe curiously argues in his opposition to Defendants Motion to Dismiss Pursuant to Rule 12(b)(6) that he has stated a claim under Title IX against Virginia Tech *and Onufriev*. <u>See</u> ECF No. 47, \*15.

unresponsive to the issues raised in Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1). A motion brought pursuant to Rule 12(b)(1) does not challenge whether a complaint states a claim for relief; it is a challenge to subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A motion brought pursuant to Rule 12(b)(6) challenges whether a complaint states a claim for relief. Fed. R. Civ. P. 12(b)(6). Defendants filed a separate motion pursuant to Rule 12(b)(6). ECF No. 41. Thus, Doe's argument as to whether he has stated a claim for a violation of due process should be disregarded for purposes of Defendants' motion brought pursuant to Rule 12(b)(1) as the two concepts are mutually exclusive.

Respectfully submitted,

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, TIMOTHY SANDS, ALEXEY ONUFRIEV, and TAMARA CHERRY-CLARKE

<u>/s/</u>

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## **CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all counsel of record.

/s/ Nathan H. Schnetzler
Of Counsel

